IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
SOUTH CAROLINA

CIVIL No. 2048

BEARD-LANEY, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States move that the decree of the District Court be affirmed.

This is a direct appeal from the final Decree,[1] entered on March 4, 1949 by a specially constituted District Court of three judges convened pursuant to Sections 2284 and 2325 of the Judicial Code as revised effective September 1, 1948 (28 U. S. C. 2284, 2325) dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on April 26, 1949, and appeal papers served on May 3, 1949.

The Commission's order, dated February 19, 1948, granted an application of Associated Petro-

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[1] On the same date the Court also rendered an opinion and made findings of fact and conclusions of law.

leum Carriers for certain operating authority as a common carrier by motor vehicle of petroleum products, in bulk, in tank trucks, over irregular routes, from certain points in North Carolina, South Carolina, and Georgia to all points in those states. Appellant is one of a number of motor carriers who were protestants in the proceeding before the Commission, seeking to prevent the authorization of the competition which would result from granting the application.

Appellees submit that this appeal involves no substantial questions. Determination of the amount and character of transportation service required by public convenience and necessity is an administrative question to be determined by the Interstate Commerce Commission in the exercise of its expert judgment as the agency upon which Congress has conferred regulatory powers over the national transportation system; and after the careful examination of the record by the District Court, a second judicial scrutiny of the evidence to determine its adequacy to support the Commission's order would be a burdensome exercise of appellate review not required in the interest of orderly and efficient administration of justice.

Applicant's predecessor, War Emergency Cooperative Association (WECA), by virtue of temporary authority granted in 1942, has conducted operations equivalent to those authorized by the Commission's order. The predecessor organization was created at the instance of the Office of Defense Transportation. Findings by the Commission, quoted in the opinion of the court below, disclose that:

> the record fails to show any existing permanent common carrier authority to operate

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> from many of the sources of supply to the destination territory here involved . . . No common carrier service is shown to be available to serve the entire territory in which a definite need for service is established by shipper witnesses.

In sustaining the Commission's order the District Court said:

> The principal position of plaintiff is that there are no adequate findings of fact upon which to base the order of the Commission and no sufficient evidence to support such findings; but we think that this position is wholly lacking in merit. The portions of the last report, which we have quoted above, are certainly sufficient, when taken in connection with the detailed findings of evidentiary facts preceding them, as findings that the service which applicant proposes to render is needed by the public, that it cannot be furnished by other carriers operating within the territory and that it will not result in destructive competition hurtful to the public interest. We may not ignore these findings because made in the form of a narrative order, rather than in separately numbered paragraphs as formerly required by Equity Rule 70½ or Rule 52 of the Federal Rules of Civil Procedure, since these have no application to the Commission. Chicago, B. & Q. R. Co. v. United States, 60 F. Supp. 580, 584; United States v. B. & O. R. Co., 293 U. S. 454, 464.
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> There can be no question that the evidence before the Commission amply supports its findings. Witness after witness testified as to the need for the service; documentary evidence shows that the operating authority of the protesting carriers is so limited that they cannot serve the territory allotted to applicant; and the fact that WECA is now handling such a large portion of the traffic is sufficient basis

for the finding that the substitution of applicant in its place will not result in competition hurtful to the public interest.

We are not impressed by the argument that, because it is not shown that protestants could not increase their facilities to take care of the need which would arise upon the withdrawal of WECA, there is no basis for granting a certificate to applicant. As stated above, protestants were not authorized to render service throughout the territory; and, quite apart from this, there is nothing in law or in reason which requires that the Commission permit those already in the field to absorb the business which would be relinquished by WECA rather than give the public the benefit of the competition which would result from the licensing of applicant.

In the light of the facts in the case at bar, the District Court's holding is amply sustained by the leading cases cited in its opinion. These authorities demonstrate that Congress has conferred upon the Commission the task of deciding what transportation service will best serve the public interest. Both the kind and quantity of transportation required are to be determined by the Commission in the exercise of its expert judgment. The Commission is vested with a wide range of administrative discretion; no particular factors are specified by the statute as controlling; in particular it is not necessary that the Commission make a finding with respect to the inadequacy of existing carriers or their inability to expand or improve their services so as to handle all available business. On the contrary, the power to authorize additional service is one of the weapons in the Commission's arsenal; and indeed, such new service may be established for the very purpose of creating competitive condi-

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tions and affording to the public the benefit of the stimulus thus provided. This construction of the pertinent statutory provisions is established by a long line of controlling authorities.[2]

In any event, whatever view be taken with respect to the scope of the Commission's authority to authorize the initiation of new competition,[3] it should be noted that in the case at bar the Commission's order would have to be sustained even if a more restrictive view were taken than is warranted by the pertinent decisions. For in the case at bar the record discloses that the service of existing carriers was in fact inadequate; and furthermore that applicant's operations will not in

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[2] *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60; *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35; *Davidson Transfer & Storage Co.* v. *United States*, 42 F. Supp. 215 (E. D. Pa., 1942), aff'd 317 U. S. 587; *North Coast Transportation Co.* v. *United States*, 54 F. Supp. 448 (N.D. Calif., S. D., 1944), aff'd 323 U. S. 668; *Carolina Scenic Coach Lines* v. *United States*, 56 F. Supp. 801 (W.D.N.C., 1944), aff'd 323 U. S. 678; *Crichton* v. *United States*, 56 F. Supp. 876 (S.D.N.Y., 1944), aff'd 323 U. S. 684; *A. B. & C. Motor Transp. Co.* v. *United States*, 69 F. Supp. 166 (D. Mass., 1946); *Lang Transp. Corp.* v. *United States*, 75 F. Supp. 915 (S.D. Calif., Cent. Div., 1948).

[3] It is clear that under federal law the carriers first in business within a particular area do not enjoy legal protection against competition subsequently arising. The Interstate Commerce Commission has power to authorize any number of different carriers to operate within the same territory. The rule applicable in federal courts applying the statutory standards established by Congress in the Interstate Commerce Act affords less protection to existing carriers, and empowers the Commission to exercise greater discretion in authorizing the institution of new or additional operations, than is the case under state law in some jurisdictions. *Indian Valley Railroad Co.* v. *United States*, 52 F. (2d) 485, 487 (N.D. Cal., 1931), aff'd 292 U. S. 608; *Pennsylvania Railroad Co.* v. *United States*, 40 F. (2d) 921, 925 (W.D. Pa., 1930); *Lang Transportation Corp.* v. *United States*, 75 F. Supp. 915, 930-1 (S.D. Calif. Cent. Div. 1948).

fact result in new competition, but merely in the continuance of the service furnished by its predecessor organization under temporary authority.[4]

Nor is any substantial question raised by appellant's further assertion in its jurisdictional statement: "The case is unusual in that upon the same record the Commission reached two contradictory conclusions." No significance attaches to the fact that the Commission's order on rehearing reversed the order unfavorable to applicant made by Division 5 on June 30, 1947, and reinstated the conclusions reached by the joint board which first passed upon the case. In the exercise of judicial review the courts are concerned only with the administrative agency's definitive and final determination, and not with preliminary stages or preparatory steps in the administrative proceeding. *B. & O. Ry Co.* v. *United States*, 298 U. S. 349, 370-1; *Federal Radio Commission* v. *Nelson Brothers*, 289 U. S. 266, 285-6. This contention of appellant is sufficiently disposed of by the following language from the opinion of the court below:

> The rules to be applied in reviewing the order of the Commission are not different because that order resulted from a reversal of a prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of the division, which received the approval of the Commission, was the final and definitive action of the Commission, which is what we are authorized to review;

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[4] Actual patronage by the shipping public of past operations, even if such operations were unauthorized or illegal, is evidence which the Commission may consider as proof of public convenience and necessity. *Crichton* v. *United States*, 56 F. Supp. 876 (S.D.N.Y., 1944), aff'd. 323 U. S. 684.

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> and it is to be reviewed in the same way and under the same limitations as other reviewable orders. We may not substitute our judgment for that of the Commission because upon a rehearing and fuller consideration of the facts it has arrived at a different conclusion from that which its hearing division had first expressed. Lang Trans. Co. v. United States, 75 F. Supp. 915, 925.

Finally, appellant's contention that operating authority should not have been granted to the applicant because applicant stockholders are engaged in the petroleum business is equally unsubstantial. If, as appellant intimates, control of transportation facilities can be used by the oil companies to monopolize the petroleum industry, such action remains amenable to the antitrust laws and is not immunized by the Commission's action in granting operating authority as a carrier to the applicant.[5] While it is the duty of the Commission to consider and give appropriate weight to the policy of the antitrust laws as an element or ingredient of public convenience and necessity,[6] it is plain that the Commission sufficiently discharged that duty in the instant case, as stated by the Court below:

> This, however, is a matter to be weighed by the Commission along with other matters in determining what is required by public convenience and necessity; and the reports of the Commission show that it was given full consid-

[5] The order in the instant case differs in this respect from orders approving mergers under Section 5 of the Interstate Commerce Act (49 U.S.C. 5) or approving rate-fixing agreements under the so-called Bulwinkle Bill now constituting Section 5a of the Act.

[6] *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 80, 86; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 76; *National Broadcasting Company* v. *United States*, 319 U. S. 190, 223.

eration and weighed against other matters deemed of greater importance in arriving at a conclusion. In this connection it is to be noted that the prohibition of 49 USCA 1(8) against transporting property owned by the carrier applies only to railroads and that an effort to amend it so as to make it applicable also to motor carriers was made when the Transportation Act of 1940 was under consideration by Congress but was abandoned. See United States v. South Buffalo R. Co., 333 U. S. 771, 776, 790 and note 10 on 790. There is nothing in the law, therefore, which forbids a motor carrier to transport commodities which it owns; and, even if there were, such provision would not prohibit the transportation of property owned by stockholders (United States v. South Buffalo R. Co., supra) and would furnish no compelling reason which would preclude the granting of a certificate of convenience and necessity where in the opinion of the Commission the public interest required it.

For the foregoing reasons, it is evident that the appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

(S.) PHILIP B. PERLMAN,
Solicitor General.

(S.) DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

MAY, 1949

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